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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-831

CROWN CENTRAL PETROLEUM CORPORATION
Petitioner

v.

JOHN T. PHILLIPS, JR., CORRADO FRANK TUMMINELLO, CHARLES PHILIP FREITAG, AND CARROLL CHARLES MYERS
Respondents

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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February 11, 1980

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Crown's petition for certiorari demonstrated that review of this case is necessary because the court of appeals, faced with the common and recurrent situation of a retail price fixing conspiracy effectuated through resale price maintenance, failed to apply the rule this Court established in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968): the party who pays the illegally fixed price, and thus the full amount of the overcharge, is the only party who may recover overcharge damages. Instead, the court of appeals held that parties who dealt directly with a co-conspirator could recover overcharge damages even though those parties, like respondents here, had not paid the illegally fixed price. This approach required a determination of the probable effect of the fixed

retail price upon the unfixed wholesale price paid by respondents, allowing them to recover that portion of the retail overcharge which could be "traced back" to these wholesale prices (Pet. 5-6).

The court of appeals' holding simply cannot be squared with the admonition in *Illinois Brick* that only "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is a party 'injured in his business or property' . . ." and thereby entitled to recover the full amount of the overcharge. 431 U.S. at 729. Indeed, respondents do not even mention, much less seriously address, Crown's showing that the policy concerns this Court found controlling in *Illinois Brick*—avoiding the difficulties of tracing an overcharge through the distribution chain; preventing any possibility of inconsistent judgments; and encouraging private enforcement of the antitrust laws —equally compel a reversal of the court of appeals in this case (Pet. 12-14). Rather, respondents engage in an unnecessarily protracted discussion of facts relevant primarily to issues on which Crown did not seek certiorari (Opp. 5-19).* [1]

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* Respondents' opposition brief will be cited as "Opp.".

[1] Crown's petition is directed to the holding of the court of appeals on damages and concedes the facts as found in the court's opinion. Thus, Crown does not here challenge the finding that it conspired to stabilize retail prices, nor the finding that it conspired to stabilize retail prices, nor the finding that, in furtherance of that conspiracy, Crown controlled the retail prices which its dealers charged to their customers (Pet. 4-6; Opp. 10 and n.8). Nor does it dispute the details of the two-step process by which the lower courts awarded to respondents that portion of the overcharge in the retail prices that could be traced back to Crown's wholesale prices (Pet. 5-6; Opp. 14-15 and n.12).

Respondent's extensive recitation of irrelevant matters cannot, however, controvert the central fact behind Crown's argument here: The express finding of the district court that there was *no evidence* Crown "fix[ed] wholesale prices" pursuant to any illegal conspiracy or agreement (Pet. 4; Pet. App. C, p. 77, n.7). This fact underscores what respondents ignore—while the dealers dealt directly with Crown, they did not pay an illegally fixed price. Therefore, as the petition showed, respondents are not entitled to recover overcharge damages which are, at best, "traced back" from the retail to the wholesale prices.[2]

In an attempt to justify the court of appeals "privity" approach, respondents must assert that they were charged "the fixed price." So, respondents argue that because their retail prices were fixed pursuant to the conspiracy, their wholesale prices were also unlawfully fixed (Opp. 5, 14-15). Yet, the mere fact that, under Crown's unique method of pricing, its wholesale price to dealers was based on and thereby controlled by the retail prices (see Pet. App. A, pp. 26-27, 31-32; Opp. 14-15) does not make the wholesale price the unlawful "fixed price." If no predetermined relationship had existed between the illegal retail prices and the whole-

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[2] Respondents' initial argument, that Crown has changed its arguments "in accordance with perceived opportunities" (Opp. 20) is particularly misguided. The only issue before the Court was not present in this case until the court of appeals forged a justification for the award of overcharge damages from the combination of vertical and horizontal conspiracies (Pet. App. A, pp. 25-34). Respondents admit that the issue was promptly raised in Crown's petition for rehearing (Opp. 21-22; see Opp. App. C, pp. 2-8). Moreover, Crown's "only contention" before the court of appeals in 1978 (Opp. 21) is still its position; respondents are not entitled to overcharge damages but must show actual lost profits.

sale prices charged by Crown to its dealers, respondents would not, even under their own rationale, have been charged a "fixed price." But in that event, under the privity approach respondents support, no one could recover overcharge damages.

Moreover, the fact of injury and the amount of damages suffered by the dealers' customers are the same regardless of the relationship between retail prices and wholesale prices. The customers always pay the fixed retail prices and the concomitant overcharge as a result of the conspiracy. Accordingly, the existence of a predetermined relationship between the illegal retail prices and the wholesale prices cannot be the *sine qua non* of overcharge recovery by the dealers, and what Crown advocates here is application of the *Illinois Brick Rule*: He who paid the unlawfully fixed prices should recover the overcharge.

Respondents make no adequate response to Crown's demonstration that the court of appeals' holding has nullified the policy considerations on which the Court expressly based *Illinois Brick*. They further do not dispute that the effect of the retail overcharge had to be traced back to the wholesale prices charged the dealers (Pet. 12-13). Nor do they deny that since Crown was not allowed to use the same two-step tracing process to show that the dealers were not injured, and could not use it as a defense if faced with a suit by the dealers' customers in another court, the court of appeals' decision creates the very possibility of inconsistent judgments and multiple liability which *Illinois Brick* sought to avoid (Pet. 13).

Respondents also provide no serious basis for the invocation in their "Conclusion" that "the longstanding policy of encouraging private enforcement of the antitrust laws" (431 U.S. at 745) would be best served by awarding them overcharge damages (Opp. 28). The question before the Court is whether respondents are entitled to overcharge damages *in addition* to injunctive relief and *instead* of proving lost profits.[3] Significantly, despite their attempt to assume credit for the result in *U.S.* v. *SIGMA*, 1980-1 Trade Cas. ¶ 63,097 (4th Cir. 1979) (Opp. 1-2, 11-12) (in which Crown was acquitted), respondents do not contend that they filed this action having such "salutory" results because of the tantalizing prospect of overcharge damages. They also do not explain why they should be rewarded with a portion of the retail overcharge while their customers, who paid the retail overcharge, should be denied recovery entirely.[4] It is difficult to see how such a result furthers private enforcement of the antitrust laws, or any other policy underlying the *Illinois Brick* decision (Pet. 14-15).

Respondents' remaining substantive argument is predicated on the misconception that Crown seeks an

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[3] The right of a party who has not paid the fixed price to sue for an injunction against the price-fixer is by now well established. *E.g.*, *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 589-94 (3d Cir. 1979). Moreover, recovery of lost profits should be permissible under *Illinois Brick* where the plaintiff is not claiming overcharge or pass-on damages. *See Dart Drug Corp.* v. *Corning Glass Works*, 1980-1 Trade Case. ¶ 63,126 at 77,629-31 (D. Md. 1979).

[4] It is no answer to say that not all the customers of Crown dealers have adequate proof of their purchases to recover damages (Opp. 27). Many of the customers, which include business entities, see *In re Independent Gasoline Antitrust Litigation*, 79 F.R.D. 552, 554-55 (D.Md. 1978), will be able to claim damages, and their right to recovery of the overcharge should not be denied solely because some other customers cannot claim damages.

exception to, rather than the application of, *Illinois Brick* to this case. Thus, respondents' attempt to distinguish the Third Circuit cases cited by Crown on the ground that the facts here do not fit the "controlled subsidiary" exception established there [5] (Opp. 22-24) is beside the point. Crown cited these cases to show that courts have interpreted and applied *Illinois Brick* to achieve results consistent with the decision's underlying policies (Pet. 10-12); this proposition is not disputed by respondents.

The argument that *In re Beef Industry Antitrust Litigation,* 600 F.2d 1148 (5th Cir. 1979) (*"Beef"*) should control the disposition of this case (Opp. 24-25) arises from the same misconception of Crown's position. *Beef* and a more recent district court case, *Dart Drug Corp.* v. *Corning Glass Works,* 1980-1 Trade Cas. ¶ 63,126 (D. Md. 1979) (*"Dart Drug"*) both discuss the so-called "vertical conspiracy" exception to *Illinois Brick.* In each case, the plaintiffs dealt directly with middlemen who in turn dealt with the defendants. The plaintiffs alleged a conspiracy among the defendants to fix prices paid (*Beef*) or charged (*Dart Drug*) to the middlemen, and this fixing of prices was alleged to have had an effect on the prices to the plaintiffs. *See Beef,* 600 F.2d at 1154-55; *Dart Drug,* 1980-1 Trade Cas. ¶ 63,126 at 77,627. The court in each case rejected the argument that because an illegal vertical conspiracy existed between the middlemen and the defendants, the plaintiffs' claims were not barred by *Illinois Brick.* Both courts

[5] *See Mid-West Paper Products Co.* v. *Continental Group, Inc.,* 596 F.2d 573, 589 (3d Cir. 1979); *In re Sugar Industry Antitrust Litigation,* 579 F.2d 13, 18-19 (3d Cir. 1978). Respondents do not discuss or distinguish the other cases cited by Crown with these decisions (Pet. 11).

held that this "vertical conspiracy" exception only applies when the middlemen are also party to the suit, because otherwise

> the possibility of inconsistent adjudications on the issue of the existence of a vertical conspiracy leaves the defendants subject to the risk of multiple liability that the *Illinois Brick* Court found unacceptable.[6]

This reasoning points out the significant difference between *Beef* and *Dart Drug* on the one hand, and this case on the other. In this case, awarding overcharge damages only to the dealers' customers also removes any possibility of inconsistent verdicts, since Crown dealers obviously cannot recover overcharge damages for retail price fixing by challenging the existence of the vertical conspiracy. Thus, unlike *Beef* and *Dart Drug,* the potential for inconsistent judgments in this case is created entirely by the court of appeals' erroneous interpretation of *Illinois Brick.*

In *Beef* and *Dart Drug,* because the alleged price-fixing occurred at the level of the middlemen, not at the plaintiffs' level, the plaintiffs were forced to assert an exception to *Illinois Brick* to recover overcharge damages. In contrast, in this case respondents' customers were charged the illegal fixed price. Consequently, respondents' customers are entitled to recover overcharge damages under the rule of *Illinois Brick,* while it is respondents who, because they were not charged the illegal price, must establish that an exception exists in order to recover overcharge damages.[7]

[6] *Beef,* 600 F.2d at 1163; see *Dart Drug, supra,* at 77,632-33.

[7] Significantly, in the only case discussing a situation similar to that at issue here, *Gas-A-Tron of Arizona* v. *American Oil Co.,*

CONCLUSION

None of respondents' arguments rebut Crown's demonstration that the court of appeals' decision represents a departure from the rule of *Illinois Brick* and establishes an erroneous precedent in an important and recurrent factual context. For the reasons stated above and in the petition, Crown's Petition For A Writ of Certiorari should be granted.

Respectfully submitted,

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1977-2 Trade Cas. ¶ 61,789 (D. Ariz. 1977), the court took the view that Crown is advocating here: proper *application* of *Illinois Brick* and *Hanover Shoe* mandates that the party who paid the fixed price recovers the overcharge, regardless of his position on the chain of distribution (1977-2 Trade Cas. ¶ 61,789 at 73,244-45). *See also Donsen Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 481, 485 (S.D.N.Y. 1973) (dictum).